SUPREME COURT, U. S.

No. 804

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

LOUISVILLE & NASHVILLE RAILROAD CO. AND PENNSYLVANIA RAILROAD CO., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Kentucky

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APPELLANTS' BRIEF

PETER T. BEARDSLEY
1616 P Street, N. W.
Washington, D. C. 20036

BRYCE REA, JR.
THOMAS M. KNEBEL
917 Munsey Building
Washington, D. C. 20004

NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for Appellants

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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APPELLANTS' BRIEF

OPINION BELOW

The opinion of the District Court in *Louisville & N. R.R. et al.* v. *United States, et al.* is reported at 268 F. Supp. 71 (1967). The reports of the Interstate Commerce Commission's Division 2, and of the entire Commission on reconsideration, in *Ingot Molds, Pa. to Steelton, Ky.*, appear at 323 I.C.C. 758 (1965) and 326 I.C.C. 77 (1965), respectively.

JURISDICTION

The judgment of the lower court (A. 32-33) was entered May 15, 1967, and notice of appeal (A. 11) was

filed on July 14, 1967. Probable jurisdiction was noted by this Court on January 15, 1968, —— U.S. ——, 88 S. Ct. 782. Jurisdiction to review the decision on direct appeal is conferred upon this Court by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001; Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. § 15a(3), and Sections 8(c) and 10(e) of the Administrative Procedure Act, 5 U.S.C. §§ 557(c) and 706, respectively, are set forth in the appendix hereto.

QUESTIONS PRESENTED

1. Does section 15a(3) of the Interstate Commerce Act limit the Commission's power to determine the lawfulness of a competitively reduced rate to the single test of whether such rate is above the out-of-pocket (incremental) cost of the proponent thereof?

2. Does section 15a(3) preclude the Commission from using the full cost of the low-cost mode as the floor for a lawful competitive rate of the high-cost mode in order to recognize and preserve the inherent advantage of the low-cost mode?

3. Is the Commission's decision, as found by the district court, contrary to this Court's decision in *ICC* v. *New York, N. H. & H. R.R.*, 372 U.S. 744 (hereinafter *New Haven*)?

4. Did the Commission state a rational basis and adequate findings to support—

   (a) its use of a comparison of full costs in determining which of the competing modes has the inherent cost advantage, and

(b) its use of the full costs of the low-cost mode as the floor for a lawful competitive rate of the high-cost mode?

STATEMENT

This case was brought in the court below by the rail appellees [1] to test the validity of their position respecting the power (more accurately, lack of power) of the Commission in intermodal competitive rate cases. Their position, briefly stated, is that the Commission lacks authority to hold unreasonably low any rate which returns at least the out-of-pocket (incremental) cost of the service provided by its proponent.

This proceeding originated with the suspension by the Commission of a railroad rate of $5.11 (reduced from $11.86) per gross ton on ingot molds and stools from Pittsburgh, Pa., to Steelton, Ky. The purpose of the reduced rail rate was to divert a substantial volume of that traffic which had been moving in barge-truck service [2] at $5.11 per gross ton.

At the hearing which followed suspension of the rail rate, it was shown that the rail fully-distributed cost of performing the service involved was $7.59; the barge-truck full cost was $5.19. The rail out-of-pocket cost was shown to be $4.689.

In the first report herein, 323 I.C.C. 758 (A. 35), the Commission's division 2 recognized that the barge-truck service possessed the inherent advantage of low cost, adhering "to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented." 323 I.C.C., 762-63 (A.

[1] The two railroads originally involved before the Commission were joined in the court below by 48 other large railroads which intervened.

[2] The truck portion of the movement was only 3.5 miles, i.e., between Owensboro, Ky., and Steelton.

41) Nevertheless, the division held that the reduced rail rate should be allowed to become effective because the barge-truck rate was 8 cents per gross ton below full cost, which, in effect, constituted a waiver of the right to the preservation of the inherent cost advantage of the barge-truck service. (A. 41-43) The rail rate became effective March 19, 1965.

Both parties to the proceeding sought reconsideration. The railroads requested "the elimination of a policy statement to the effect that fully distributed costs are adhered to by the Commission in determining the low-cost mode." (A. 63) The barge lines sought reversal of Division 2's report on the ground that it "is contrary to the legislative history of Section 15a(3) of the Interstate Commerce Act, and cannot be reconciled with any reasonable theory of destructive competition, as reflected in the national transportation policy." *Ibid.*

In its report on reconsideration (326 I.C.C. 77, A. 60), the entire Commission agreed with Division 2's conclusion that full costs should be compared in determining which mode of transport has the inherent cost advantage (A. 66); however, it disagreed with the division's conclusion that the barge lines had lost the right to have their inherent cost advantage preserved, because "such an advantage cannot be lost merely by the creation, accidental or otherwise, of a rate below a fully distributed cost level." (A. 69) The Commission concluded that "by reducing its [sic] rate below the level of the barge-truck full costs, the respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage." It found the rate "unjust and unreasonable, and in contravention of the national transportation policy," (A. 71-72) and ordered it cancelled. (A. 80)

The railroads sued in the court below to set aside the Commission's order. The Department of Justice chose not to defend the Commission's order, but actively sided with

the railroads. These appellants, representing the regulated motor-carrier industry, intervened in support of the Commission's order,[3] to defend its power in intermodal rate cases. The lower court set aside the Commission's order on the grounds that "the Commission failed to take adequate account of the Congressional intent that carriers should normally be free to offer rates which are compensatory, i.e., above relevant out-of-pocket costs," 268 F. Supp. 82 (A. 31), and "that the record here and the Commission's report supply no basic [sic] for disregarding that intent." 268 F. Supp. 83 (A. 32)

SUMMARY OF ARGUMENT

These appellants interpret the decision of the lower court as giving the railroads all that they have long sought through their various proposals to amend the rule of ratemaking in the Interstate Commerce Act, which Congress has steadfastly refused to grant them up to and including the 1958 amendment of Section 15a. By that amendment Congress did not manifest an intent to allow carriers almost complete freedom to publish rates which return little or nothing more than the out-of-pocket cost of providing the service involved. To the contrary, the pertinent legislative history makes it clear that Congress intended that the Commission should have discretion to disallow rates which return revenue sufficient only to cover, or slightly in excess of, out-of-pocket cost, when the proponent of such rates is the high-cost carrier on a fully-distributed cost basis.

In reaching its conclusion respecting the Congressional intent underlying enactment of Section 15a(3), the court below erred:

(a) in its interpretation of the pertinent committee reports;

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[3] In addition to the intervening rail plaintiffs referred to *supra*, p. 3, n. 1, various water carrier interests intervened in support of the Commission's order.

(b) in its reliance upon the Commission and court cases cited as supporting its decision; and

(c) in its assumption that rejection of the so-called Miller-Wadsworth amendment has a bearing upon the situation involved in this proceeding, and its construction of the National Transportation Policy.

If Congress had intended to establish the strict limits on the power of the Commission in intermodal competitive ratemaking cases which the court below found it did, it seems obvious that intention would have been manifested, not by indirection, but in clear and specific legislative language.

In addition, this Court's *New Haven* decision forecloses that of the court below. And the position which the Department of Justice took below was—with respect to the salient point here involved—contrary to that which it took, and, more importantly, contrary to this Court's *New Haven* decision.

Finally, the Commission's decision does not lack a rational basis merely because the lower court disagreed with its treatment of the conflicting carrier interests before it.

ARGUMENT

Interest of Appellants

While the court below noted (A. 31) "that there [could] be situations where the Commission has power, under Section 15a(3) and the National Transportation Policy, to prohibit reduced rates even though they are compensatory," it offered no example of such a situation. With deference, we submit that if the situation here involved does not evoke such power in the Commission, it is hard to imagine one which would.

Generally speaking, the nature of the railroads' plant and operations, and the wide variety of the traffic they transport, results in their having, with some exceptions,

lower out-of-pocket costs than their competitors. This, coupled with their enormous financial power, which is rapidly being concentrated in the hands of fewer and fewer railroads as a result of the rail merger movement, gathering momentum for some years and still under full throttle, makes it impossible for water and motor carriers to compete with railroads on the basis of rates which return only (or little more than) out-of-pocket costs.

What the court below has done is to embrace the railroads' theory that the Commission may not hold unreasonably low any rate which returns at least the out-of-pocket cost of providing the service involved. The impact which the forced adoption of this policy by the Commission would have upon the railroads' motor and water competitors would be disastrous. The report of the Commission furnishes a graphic illustration of the railroads' power—assuming the validity of the rail theory of intermodal competitive ratemaking—to treat their competitors like "sitting ducks" and pick off, selectively, their most valuable traffic. The Commission (A. 68) noted that "iron and steel products, which includes ingot molds, is the third most important commodity group transported in barge service, accounting for 10.81 percent of their total revenue. It is 1 of 11 commodity groups which account for 81.45 percent of the total barge revenue. In fact, the railroads readily concede this point."[4]

The District Court Misinterpreted The Legislative History of Section 15a(3)

Bills (S. 1920 and H. R. 6141) were introduced in the 84th Congress which, among other things, proposed revi-

[4] There are many motor carriers which are authorized to transport only one (e.g. automobiles) or limited categories of commodities (e.g. iron and steel products). Even in the case of motor carriers authorized to transport "general commodities" they cannot offer significant competition in the handling of many commodities (e.g., coal) because of the railroads' inherent advantage of low cost on most such movements.

sion of the ratemaking section of Part I of the Act (§ 15a). They would have prohibited the Commission, in determining whether a rate was unreasonably low, from considering or giving effect to the low-cost status of a competitive mode, or preserving the inherent advantage thereof. This was to be accomplished by amendment of Section 15a(1) of the Interstate Commerce Act to include the "three shall nots." These "shall nots" would have prohibited the Commission, "in determining whether a rate, fare, or charge, or classification, regulation, or practice to be applied in connection therewith, results in . . . less than a reasonable minimum charge" from considering "the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation . . . ."[5] This proposal was endorsed by a witness appearing for the Association of American Railroads.[6] These bills died in committee. Enactment of the "three shall nots" would have prevented the Commission, in this proceeding, from comparing the costs of the competing modes in order to determine which of them possessed the inherent advantage, or from finding, as it did, that the rail rate impinged upon that inherent advantage and contravened the National Transportation Policy. Ironically, the decision below limits the Commission's discretion to precisely the same extent as would have resulted from enactment of the "three shall nots."

In the 85th Congress, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce issued a report in which it recom-

[5] TRANSPORTATION POLICY, Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, April-June, 1956, 84th Cong., 2nd Sess., p. 5. These are printed in three parts and extend through 1860 pages. H.R. 6141 is reproduced in Part 1 at pages 1-15.

[6] *Id.*, p. 548.

mended the addition to Section 15a of a new paragraph (3) to read as follows: [7]

> In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad *and not by such other mode.* (Emphasis supplied)

After additional hearings before the entire Committee at which the Chairman of the Commission registered its opposition to the proposal,[8] the Committee recommended the language finally enacted, which language not only eliminated the phrase "and not by such other mode," but added the last sentence in the subsection which requires that due consideration be given to the objectives of the National Transportation Policy.[9] When section 15a(3), as cast in that form, was enacted, Congress had before it the testimony of the then Chairman of the Commission that the phrase, ultimately discarded, "and not by such other mode," was objectionable because it "would enable the railroads to contend that it is intended to give to them complete freedom, in the presence of competition from another mode of transportation, to establish rates which merely cover out-of-pocket costs" [10] and also his earlier testimony that "[f]or the purpose of ascertaining the most economical form of carriage, full costs should be the

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[7] PROBLEMS OF THE RAILROADS, Committee Print of Report of the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2nd Sess., p. 12.

[8] RATEMAKING RULE-ICC ACT, Hearings Before the Senate Committee on Interstate and Foreign Commerce, May 20-21, 1958, 85th Cong., 2nd Sess., on S. 3778 pp. 166-169.

[9] TRANSPORTATION ACT OF 1958, Report of the Senate Committee on Interstate and Foreign Commerce on S. 3778, S. Rept. No. 1647, 85th Cong., 2nd Sess., June 3, 1958, pp. 2-4.

[10] Hearings, n. 8, *supra*, p. 167.

test." [11] This testimony of the Chairman of the Commission is ignored by the lower court in its opinion.

The Cases Relied Upon By The Court Below Do Not Support Its Decision

To buttress its conclusion that Congress intended to allow railroads complete freedom to reduce their rates, so long as they recovered out-of-pocket cost, the court relies heavily on the *New Automobiles* case,[12] and other cited cases. This reliance is misplaced.

The *New Automobiles* case was an extremely comprehensive proceeding embracing "all rates, charges, rules, regulations, and practices in the United States subject to parts I and II of the Interstate Commerce Act applying to the interstate transportation of new automobiles, whether by rail, in carloads, or by truck-away, tow-bar or drive-away, hereinafter described, or by any of these modes in conjunction with water carriage." [13] The opinion therein occupies over 100 pages in the volume in which it is reported. If nothing else, the contrast between the complex issues there, and the relatively simple ones here, illustrates the impossible task which would confront the Commission in attempting to carry out its duty in deciding a wide variety of rate cases under the theory adopted by the court below.[14]

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[11] PROBLEMS OF THE RAILROADS, Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, January-April, 1958, 85th Cong., 2nd Sess. The printed record is in four parts and contains 2355 pages. The testimony quoted was given on March 28, 1958, and is at p. 1839.

[12] New Automobiles in Interstate Commerce, 259 I.C.C. 475 (1945).

[13] *Id.*, at 477.

[14] We do not mean that Congress could not do what the lower court seems to hold it has done. But we do suggest that Congress is aware of the extremely complicated rate problems often faced by the Commission and can hardly have intended, by indirection, to have so drastically limited its power to deal with them.

New Automobiles does not support the decision of the court below. The motor carriers there—unlike the barge lines here—were not seeking to preserve an inherent low cost advantage. In fact, the Commission's report notes, *id.*, at 530, that one of the motor carrier representatives sought a rule that "in meeting highway competition the railroads should in no instance go below the fully distributed rail costs *or the truck rates.*" (Emphasis supplied) As to this contention, the Commission said, *Id.*, 539:

> Freezing the rail and the motor-carrier rates on a common level would allocate additional traffic to the motor carriers, because of their door-to-door service and other advantages. For movements exceeding 200 miles, the rate parity and the advantages of the motor carriers would spread an umbrella over them, and bring them much more of the long-haul traffic, *although for such distances they are least fit from a cost standpoint.* As shown, they already have most of the short-haul traffic. The rail costs permit the rail carriers, except for very short hauls, to meet the present highway competition at compensatory rates lower than the motor common carrier rates. (Emphasis supplied)

Without going into greater detail regarding the Commission's *New Automobiles* decision, we think it clear that it does not stand for the proposition which the lower court attributes to it, i.e., that the Commission may not ordinarily determine which transport mode has the inherent advantage of low cost on the basis of fully-distributed costs.

The lower court also stated (A. 25) that it "gain[s] support" from the decision in *Missouri Pacific R.R.* v. *United States*, 203 F. Supp. 629 (1962). But the court seems to have concentrated solely upon the outcome of *Missouri Pacific*, as distinguished from the far different circumstances there than those here. The district court there twice noted, 203 F. Supp. 632, and 634-35, that the Commission had found that "[i]nterpretation of the low

cost mode of transportation is impossible on this record, and the decision rests on other grounds," and further, the rail rates were "compensatory, and generally exceed full cost."

In *Missouri Pacific* the district court pointed out the obligation of the motor carriers which protested the railroad rates to show that the motor-carrier service was the low-cost mode, and that they had failed to do so. *Id.*, at 635. This factor, together with the cited findings of the Commission, persuaded the court that it "is the rails' inherent advantage . . . which is being asserted in the instant rates," and that "[c]ancellation of the proposed rates would hinder competition fostered by Section 15a (3) and destroy, not preserve, inherent advantage." *Ibid.*

The facts here are the opposite of those in *Missouri Pacific*. Here it is the rails' competitors which have shown that they are the low-cost mode. Here, unlike the situation in *Missouri Pacific*, the reduced rail rate doesn't even approach full cost, much less exceed it. It is thus clear that *Missouri Pacific*, properly interpreted, supports the decision of the Commission here, and not that of the court below.

The court below (A. 28) also referred to the approval expressed by the Senate Committee of this Court's language in its *Schaffer* [15] decision:

> The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of "inherent advantage" that the congressional policy requires the Commission to recognize.

We concede that the purpose of enacting Section 15a(3) was to promote intermodal competition in transportation —if that is what the lower court means to imply. But *Schaffer* involved denial by the Commission of an applica-

[15] *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957).

tion to provide motor carrier service on the ground that rail service could adequately meet the needs of the shippers supporting the application. And as this Court noted, the Commission "discounted the testimony" of the shippers because it believed that their main purpose "was the prospect of obtaining lower rates." 355 U.S., at 91. It is in this context that the cited statement in *Schaffer* must be evaluated. Certainly, neither this Court's *Schaffer* decision nor the "approval" of the language quoted therefrom by the Senate Committee lend support to the decision of the court below.

The Court Below Erred In The Inference It Drew From Rejection Of The Miller-Wadsworth Amendment And Its Construction Of The National Transportation Policy

The lower court construed the legislative history of the Transportation Act of 1940, with particular emphasis on the rejection of the so-called Miller-Wadsworth amendment, as supporting the conclusion it reached, pointing out that Congress "rejected all proposals which would have prevented carriers from offering compensatory rates which were below fully-distributed costs . . . .". (A. 30). We have no quarrel with this reading as a literal interpretation. But it does not prove the converse. Because Congress, admittedly, recognized the impracticality of requiring rates which would recover full cost on all traffic, it surely does not follow that it intended to lay down an inflexible rule that any mode of transport was free to publish rates, on any and all traffic, which recover only, or little more than, out-of-pocket cost, with the Commission powerless to exercise any restraint on the carriers' managerial discretion. Just as the first proposition would mean that many commodities would not move in commerce, or that their present movement would be significantly reduced, so the second would pose the threat of bankruptcy for the entire transport industry, or at least the smaller and financially weaker segments thereof.

The district court refers briefly [16] to some of Congressman Wolverton's remarks regarding the Miller-Wadsworth amendment. A more extensive examination fails to support the inference drawn by the district court. In his remarks on the amendment, the Congressman also said (86 Cong. Rec. 10191 (1940)):

> The bill before us provides for fair and impartial regulation of all modes of transportation so that the inherent advantages of each will be recognized and preserved. There is no need for any amendment to give each form of transportation assurance on this point.
>
> The bill, as it stands, also fully protects one type of common carrier from unfair rate-cutting competition by another having higher costs. In the light of its provisions, the Interstate Commerce Commission could not permit such unfair or destructive competitive practices. Consequently, the Wadsworth amendment would contribute nothing in the way of safeguarding a carrier from unfair rate-cutting but would create an unbearable and unjust burden upon shippers.
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> * * * *
>
> Under the amendment Congress would prescribe a rigid rule to control the Interstate Commerce Commission's judgment concerning minimum rates. *It has long been recognized that making freight rates by statute cannot be successful. Neither can regulation by arbitrary and inflexible rate-making rules be successful. Flexibility and elasticity are as important to transportation price making as they are to price making in other industries, and rates cannot be made by formula, but must be regulated by the sound judgment of an administrative body.* (Emphasis supplied)

The proper inference to be drawn from Congressman Wolverton's remarks, we submit, is that Congress, in rejecting the Miller-Wadworth amendment, desired to avoid statutory ratemaking *of any kind*. It is, therefore, error

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[16] 268 F. Supp., at 82, including n. 5 (A. 30-31).

to ascribe to such rejection any inference that Congress intended to depart from its traditional policy of allowing the Commission a considerable degree of "[f]lexibility and elasticity" in the field of "transportation price making." Yet that is the intent which the decision of the district court imputes to the rejection of the proposed amendment.

The failure of the court below to give adequate consideration to several pertinent provisions of the National Transportation Policy was, to some extent, responsible for its erroneous conclusion respecting Congress' intent in enacting Section 15a(3). It is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act," *Richards* v. *United States*, 369 U.S. 1, 11 (1962). Neither, we submit, should one provision of the National Transportation Policy be read in isolation from the balance thereof. The district court stressed the provision of the Policy requiring the Commission "to promote efficient and economical use of transportation resources and the establishment of rates which are as low as possible." (A. 19) It virtually ignored several other equally relevant provisions of the Policy, requiring the Commission to preserve the inherent advantages of each transport mode, to foster sound economic conditions in transportation and among the several carriers, and to prevent unfair or destructive competitive practices. Admittedly, some of these provisions, if their aims are pursued separately, present a conflict. The Commission cannot, as did the court below, concern itself in a case such as this with only one of the Policy's mandates. To the best of its ability, it must reconcile the otherwise conflicting provisions thereof, and act as a "coordinator of the different modes of transportation." *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194, 205-206 (1944). How, we ask, may it be expected, at one and the same time, to fulfill *all* its obligations under the National Transportation Policy without the discretion—which the lower court would deny it—to determine, on

the facts of this case, that the inherent advantage of low cost rests with the barge-truck service, and that the rail rate, which returns substantially less than full cost, impairs that inherent advantage in contravention of the Policy?

The Congressional Intent Found By The District Court Would Have Been Expressed Unambiguously

It would have been easy for the Congress, if its "mandate" to the Commission in the form of the new Section 15a(3) was as restrictive as the court below finds it to be, to have expressed such intention in simple and unambiguous language. It could, for example, have enacted the "three shall nots." But it did not do so. It could have amended the law to provide that the Commission should find no rate unreasonably low which returned at least the out-of-pocket cost of the service to which it applied. But it did not do this either.

The report of the Senate Committee on Interstate and Foreign Commerce notes that the new subsection (3) of Section 15a "is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, *with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy.*" Senate Rep. No. 1647, 85th Cong., 2nd Sess., p. 3 (Emphasis supplied)

Again, we suggest that had Congress intended to write a hard and fast rule that the Commission could hold no rate violative of the cited language of the National Transportation Policy unless it failed to return at least out-of-pocket cost, it would have chosen more appropriate language than that referred to. This, we respectfully submit, points up the basic error in the decision of the court be-

low. It finds an intent by Congress to severely limit—by a mechanistic formula—the Commission's function and authority in the area of competitive ratemaking; yet it nowhere points to specific language, in either the law or committee reports, which makes this claimed intent reasonably clear.

The New Haven Decision Forecloses That of the Court Below

These appellants read this Court's *New Haven* decision as clear support for the action which the Commission took. The lower court notes, first, that this Court left open the question of which, if either, of out-of-pocket or fully distributed costs is the "appropriate method of deciding which of two competing modes has the cost advantage on a given movement."[17] It then contents itself with rather limited quotation from this Court's *New Haven* decision, stressing those portions which note that Congress did not regard a rate of one transport mode as unfair or destructive merely because its effect might be to divert traffic from a competing mode. (A. 23)

Yet the fact is that this Court's *New Haven* decision anticipated *exactly* the situation here involved, and established a guidepost which the court below ignored. To us, the "key" language of this Court's opinion, which should have governed the decision of the court below, is as follows:

> If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, *without more*, to furnish a basis for rejecting the rate. Section 15a(3), in

[17] A. 18, citing 372 U.S., at 760-61.

> other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. *The principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.* 372 U.S. at 759 (Emphasis supplied)

In this connection, it is pertinent to refer to the position of the Department of Justice before this Court in the *New Haven* case. Among other things, its brief there contains a thorough review of the legislative history of Section 15a(3).[18] Later, *Id.*, p. 40, the Department stated that the district court in *New Haven* "was correct in holding that the cancellation of these rates [which return at least the fully-distributed cost of carriage] was improper." And the Department set forth, *Id.*, 40-41, what it contended should be the standard "to justify the disallowance of a proposed rate reduction because of its impact on a competitor." The Department espoused the view that such a disallowance would be justified where the competitor (1) possesses an inherent cost advantage which (2) the proposed rate would "destroy, or at least impair." Continuing, the Department concluded:

> Such impairment occurs, we submit, when the low-cost carrier is unable to fix a rate which (a) covers its fully distributed costs and (b) affords it in [sic] a rate advantage (as against the high-cost carrier) which is no less than the cost differential (measured in terms of fully distributed costs) between the two modes.

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[18] Brief for the United States in Nos. 108, 109, 110, 125, *I.C.C. et al.* v. *N.Y., N.H. & H. R.R.*, October Term, 1962, pp. 22-39.

> Certainly, then, in ordinary circumstances, a rate which exceeds the fully distributed costs of the high-cost carrier cannot be deemed "destructive." Conceivably in some instances the low-cost mode may require for particular movements a rate significantly higher than fully distributed costs in order to offset revenue deficiencies on other freight which will not move at a fully compensatory rate; in such cases, there might be justication for maintaining a differential at levels higher than would otherwise be warranted. . . .[19]

It is thus clear, we submit, that the Department of Justice, when *New Haven* was under consideration by this Court, took a position not at all in accord with the decision of the court below in this case. Its concern in *New Haven* with limiting the Commission's discretion in cases involving intermodal rate competition was restricted to those instances in which the Commission was dealing with rates which would recover full cost. And we think it fair to say that the emphasized portion of this Court's *New Haven* opinion, quoted, *supra*, pp. 17-18, validates the standard the Department there espoused as justification for the disallowance of a proposed rate reduction. Nevertheless, despite the absence of any intervening legislation, the Department, in the court below, took a position diametrically opposed to its previous, *New Haven*, position. Without attempting to deal in detail with its brief filed below, it should suffice to quote the concluding paragraph (p. 74) of its summary of the legislative history of Section 15a(3) and the National Transportation Policy:

> In sum, the legislative histories of Section 15a(3) and the National Transportation Policy, when read

[19] It is interesting to note that the Department's position in *New Haven* would, under the circumstances specified, justify the Commission's requiring a high cost transport mode to maintain its rate at a level even higher than that necessary to reflect the full cost differential between its service and that of the low cost mode. This proceeding, of course, does not require this Court to evaluate the validity of the Department's postulate.

together, demonstrate a Congressional intent that carriers not be prevented from offering rates which exceed relevant out-of-pocket costs. They furnish no support for the Commission's order and require the conclusion that it is erroneous.

We are aware that it is not unique for the Department to take opposite positions in the district courts and this Court in cases involving ICC orders.[20] But this is the only such case, to our knowledge, in which the Department, after establishing a position, and having had it, in effect, approved by this Court, has seen fit to then take a directly contrary position in a subsequent case involving the same principle. In any event, we submit, it was right the first time, and, as already noted, this Court's *New Haven* decision forecloses that of the court below.

The Commission's Decision Has a Rational Basis

The district court (A. 17) held that the Commission's order "lacks a rational basis." But an analysis of the lower court's decision, we submit, shows that what it really meant was that it did not agree with the Commission's use of fully-distributed cost as the measurement to determine which of the competing transport modes involved possessed the inherent advantage of low cost. Perhaps the lower court believed that since the railroads had introduced voluminous testimony (A. 81-160) by several economists who espoused their views with respect to competitive ratemaking, the Commission was obliged to explain its rejection of those views in similar detail.[21] We submit that the Commission had no such obligation, and that its reasoning in support of its conclusion constitutes a rational basis therefor.

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[20] See, for example, *Schaffer, supra*, 355 U.S., at 87 (n. 4).

[21] Admittedly, the "bulk" of economic testimony, largely repetitive, was placed in the record by the railroads. But there was countervailing testimony. See that of Witness Steiner, A. 178 *et seq.*, particularly A. 203-224.

This Court has held that a regulatory agency such as the Commission is not bound to accept expert opinion evidence tendered by a proponent when the experts are in disagreement and interested, the subject is inherently uncertain, and the opinion is founded on a basic theory which the Commission could lawfully disapprove. *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U.S. 290, 299-300 (1934). In *Market Street R. Co.* v. *Railroad Comm. of California*, 324 U.S. 548, 560 (1945), this Court said:

> Experts' judgments, however, would not bind the Commission. Their testimony would be in the nature of argument or opinion, and the weight to be given it would depend upon the Commission's estimate of the reasonableness of their conclusions and the force of their reasoning.

And in *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173, the Court rejected the proposition that the Commission's findings are insufficient where it fails to make them in the terms in which an argument is advanced.

The Commission devoted a substantial portion (A. 64-72) of its report to a discussion of its reasons for disagreeing with the contentions of the railroads and their economists. And, we submit, a reading of the *whole* discussion, rather than merely that small portion cited by the court below (A. 18-19), fairly discloses the rationale underlying its choice of full, rather than out-of-pocket, cost as the proper determinant for measuring which of the competing transport modes was the low-cost carrier.

In view of the many prior pronouncements by the Commission of the principle here followed, it would have been enough if the Commission merely stated that it continued to follow its well-established policy for reasons articulated in its prior decisions, studies and reports to the Congress. See *J. H. Nowinsky Trucking Co.* v. *United States*, 196 F. Supp. 748, 751 (N.D. Wis., 1961); *Simpson* v. *United*

States, 200 F. Supp. 372, 377 (S.D. Iowa, 1961), aff'd, 369 U.S. 526; Cf. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953).

In stating its reasons for rejecting the argument of the railroad economists and for choosing to stay with the full-cost basis for determining which of the competing transport modes possessed the inherent advantage which the National Transportation Policy requires it to recognize and preserve, Division 2 found as follows:

> For carriers to remain in business constant costs must be recovered, which is to say that full costs in the aggregate must be obtained if the Nation's transportation system is to be healthy. Thus, whenever competitive carriers of different modes assert cost advantages inherent to their respective modes, we have recognized in fully distributed costs the only sound standard of measurement reflecting as many attributable constant costs as it is reasonably practicable to apportion. Difficulties of apportioning constant costs do prevail. See *Grain in Multiple-Car Shipments—River Crossings to So.*, 321 I.C.C. 582, 597, reversed on other grounds in *Cincinnati, N.O. & T. P. R. Co.* v. *United States*, 220 F. Supp. 46 (S.D., Ohio 1963), appeal docketed, U.S. July 29, 1964, (No. 545). Since constant costs are not directly related to service units, they are assigned on an average statistical basis. In our opinion, however, that assignment does not detract from their worth. We adhere to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented. Stated differently, we recognize the existence of constant costs. The use of out-of-pocket or incremental costs advanced herein by respondents ignores them. We decline to so limit our ratemaking powers. (A. 40-41; footnotes omitted)

The entire Commission agreed with the findings of Division 2 which analyzed the argument of the four economists. The district court completely ignored the above

explanation, and instead quarreled with the merits of further findings of the entire Commission, which read:

> We do not agree with respondents' arguments that fully distributed costs are an inappropriate or inadequate measure of the inherent cost advantages of competing regulated carriers. That is not to say that fully distributed costs should set the floor for transportation prices. In the setting of particular rates, as where competition from unregulated carriers compels, a carrier should be allowed to set its rates below fully distributed costs. However, merely because a carrier is able, without incurring an out-of-pocket loss, to handle certain traffic at rates below fully distributed costs, and perhaps by diverting sufficient tonnage from its regulated competitors to maximize thereby the contribution that such traffic would make to its overhead, does not necessarily mean that the carrier is the more efficient of the two. Carriers, such as the railroad respondents, do not, in the circumstances here present, possess an inherent cost advantage within the context of the national transportation policy which the Commission is obligated to recognize and preserve. (A. 67-68)

These findings clearly express the Commission view that to leave the high-cost mode free to make rates on the basis of out-of-pocket (incremental) costs would fail to preserve the inherent cost advantage of the low-cost mode, since the low-cost mode would thereupon be unable to compete on a rate level which would permit it to recover its full costs. The Commission reasoned that if the lower cost mode were forced to compete with rates of the high-cost mode at the level of the latter's incremental costs, the ability of the low-cost mode to continue in full vigor as a part of our national transportation system would be impaired. If this were to happen, the Commission would not be able to coordinate its regulation of the competing modes so as to attain the objectives of the National Transportation Policy. These are rational reasons which are adequate under the requirements of the Administrative Pro-

cedure Act to support the Commission's order. This is particularly true in view of the railroads' complete failure to carry their burden of demonstrating that the Commission's long-established policy failed to properly measure the "inherent advantage" of low cost.

That a court may disagree with the Commission's analysis of complex accounting and economic issues, as did the lower court, is not enough to justify setting aside its order on the ground that it lacks a rational basis. As this Court said in *Chicago & N. W. R. Co.* v. *Atchinson, T. & S. F. Ry.*, 387 U.S. 326, 356 (1967):

> Its [Commission's] factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry. Our previous description of the Commission's disposition of these matters is sufficient to show that its conclusions had reasoned foundation and were within the area of its expert judgment. (Citations omitted)

CONCLUSION

The order of the Commission here involved did not lack a rational basis, and did not exceed its statutory authority to determine which of the competitive transport modes before it possessed the inherent advantage of low cost. Neither the legislative history of Section 15a(3) nor the National Transportation Policy supports the action of the lower court in setting aside the Commission's order. This Court's *New Haven* decision anticipated the precise situation with which the Commission was here faced, and foreordained a conclusion opposite to that reached by the court below.

For the reasons stated, it is submitted that the judgment of the court below should be reversed and the case remanded with instructions to dismiss the complaint.

Respectfully submitted,

PETER T. BEARDSLEY
1616 P Street, N. W.
Washington, D. C. 20036

BRYCE REA, JR.
THOMAS M. KNEBEL
917 Munsey Building
Washington, D. C. 20004

NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 8th day of March, 1968, I served copies of the foregoing document on the several parties hereto, in duly-addressed envelopes, with postage prepaid, as follows:

1. On Honorable Erwin R. Griswold, The Solicitor General, Department of Justice, Washington, D. C. 20530, and on Donald F. Turner, John H. D. Wigger, and Robert Johnson, Esqs., Department of Justice, Washington, D. C. 20530.

2. On Robert W. Ginnane, Esq., General Counsel, and Leonard S. Goodman, Esq., Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

3. On Harry C. Ames, Jr., Esq., 529 Transportation Building, Washington, D. C. 20006, J. Raymond Clark, Esq., 743 Investment Building, Washington, D. C. 20036, and A. Alvis Layne, Pennsylvania Building, Washington, D. C. 20004, counsel for appellant barge lines.

4. On Carl Helmetag, Jr., Esq., Six Penn Center Plaza, Philadelphia, Pa. 19103, Elbert R. Leigh, Esq., 908 West Broadway, Louisville, Ky. 40201, and Harry J. Breithaupt, Jr., Esq., 929 Transportation Building, Washington, D. C. 20006, counsel for appellees.

PETER T. BEARDSLEY

APPENDIX

NATIONAL TRANSPORTATION POLICY

[September 18, 1940.] [49 U. S. C., *preceding* §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficie t service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

RULE OF RATE MAKING

Sec. 15a [February 28, 1920; amended June 16, 1933, September 18, 1940, August 12, 1958.] [49 U.S.C. § 15a.]

* * * *

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a

particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

ADMINISTRATIVE PROCEDURE ACT

Sec. 8 [June 11, 1946, amended September 6, 1966] [5 U.S.C. § 557]

* * * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

* * * *

Sec. 10 [June 11, 1946, amended September 6, 1966] [5 U.S.C. § 706] To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicabil-

ity of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.